information providers, the anachronistic scarcity rationale can no longer be invoked mechanically to justify a lower level of scrutiny for broadcast ownership regulations than for regulations affecting other forms of media. Indeed, the biennial review analysis required by Section 202(h) affords the Commission the opportunity to address squarely the issue of whether the scarcity rationale represents a viable regulatory concept in today's exploding mass media marketplace.[32]

Thus, the Commission has an obligation in this proceeding to carefully consider the constitutional implications as well as to reevaluate the reasonableness of its anachronistic newspaper/broadcast cross-ownership policy in light of the substantial changes in the

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[32] See Notice of Inquiry, (separate statement of Commissioner Harold W. Furchtgott-Roth at 3) ("[T]he factual validity of the spectrum scarcity rationale is a critical element of the analysis required by 202(h). . . . [The Commission] cannon stick [its] heads in the regulatory sands, hoping that no one will notice the eroded foundations of [its] rules."); see also John O. McGinnis, The Once and Future Property-based Version of the First Amendment, 63 U. Chi. L. Rev. 49, 113 (1996) ("It is difficult . . . to understand how broadcasting can be evaluated in the future under wholly distinct First Amendment standards from that of cable. Cable and broadcasting are competitors in the market for live home video programming. Resources that are not scarce in a constitutional sense when cable alone is at issue cannot become scarce when broadcasting is added to the market."); Henry Geller, Turner Broadcasting, The First Amendment, and The New Electronic Delivery Systems, 95 Mich. Tel. Tech. L. Rev. 1, 17 n.46 (1995) ("[T]he long run effect of [Turner Broadcasting Systems v. FCC] will be to make heightened scrutiny analysis generally applicable to the new electronic fields. This is sound, not only under First Amendment law and precedent, but also as a matter of policy in light of the dawning era of enormous electronic abundance."); Timothy B. Dyke, Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer, 5 Yale J. on Reg. 299, 300-01 (1988) (The Courts "may be on the threshold of accepting the principle that at least the core First Amendment protections against government control . . . must apply to the broadcast medium as well as to the print medium.").

information marketplace since the rule was adopted.[33] NAA respectfully submits that the scarcity rationale does not provide a sufficient basis for maintenance of the restrictions and that the Commission's stated rationale for the cross-ownership ban -- that it is necessary to promote diversity and competition -- clearly fails in today's prolific mass media marketplace. In light of the immense changes that have occurred in the mass media marketplace as well as the Commission's broad deregulation of mass media ownership since the rule's adoption, there no longer exists (if there ever did) any substantial government interest justifying an outright prohibition on newspaper/broadcast cross-ownership.[34]

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[33] See Syracuse Peace Council v. FCC, 867 F.2d at 656 ("[A]n agency could not blind itself to a constitutional defense to a 'self-generated' policy.") (citation omitted); see also Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6387 (1992) (Memorandum Opinion and Order and Further Notice of Proposed Rulemaking) ("1992 Revision of Radio Rules") (noting "the dramatic increase in competition and diversity in the radio industry over the last decade" as a basis for relaxation of the radio ownership rules); Syracuse Peace Council against Television Station WTVH, 2 FCC Rcd 5043, 5043 (1987) (recognizing the "explosive growth in the number and types of information sources available in the marketplace" as a factor in the unconstitutionality of the fairness doctrine).

[34] See David Bartlett, The Soul of a News Machine: Electronic Journalism in the Twenty-First Century, 47 Fed. Comm. L. J. 1, 5 (1994) "It remains to be seen whether the new regulatory structures that will emerge in response to changing technological and economic circumstances will help or hinder the development of a more efficient and competitive marketplace."); Donald E. Lively, Modern Media and the First Amendment, 67 Wash. L. Rev. 599, 601 (1992) ("As new media continue to evolve and expand, . . . the selective attention to and limitation of broadcasting seems even more anachronistic and counterproductive.").

IV. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RESTRICTION WAS ADOPTED WITHOUT ANY RECORD EVIDENCE OF ANTI-COMPETITIVE CONDUCT BY CROSS-OWNERS, BASED ONLY UPON SPECULATIVE ASSUMPTIONS ABOUT DIVERSITY THAT HAVE NOT WITHSTOOD THE TEST OF TIME.

In order to undertake the searching analysis of the newspaper/broadcast cross-ownership rule mandated by Congress and required under applicable administrative and constitutional precedent, it is necessary first to examine the circumstances surrounding the original adoption of the rule in 1975 and to attempt to discern both the Commission's purposes in adopting the proscription and the means by which the rule was intended to further those purposes.[35]

As noted in NAA's Petition for Rulemaking, the FCC historically encouraged the participation of newspaper publishers in the broadcasting industry. Publishers pioneered first AM service and, subsequently, FM and television service in many communities.[36] Even in its 1975 decision adopting the newspaper/broadcast cross-ownership rule, the Commission recognized the "pioneering spirit" of cross-owners and the "[t]raditions of service" that newspaper publishers brought to the broadcasting industry.[37] Indeed, in expressing her strong reluctance to concur with the limited divestiture policy of the 1975 order, then-Commissioner

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[35] See Notice of Inquiry (separate statement of Commissioner Furchtgott-Roth).

[36] See 1975 Multiple Ownership Report, 50 FCC 2d at 1074, 1078.

[37] Id.

Reid emphasized the "long history of service" of newspaper/broadcast combinations and noted that "[m]any [combinations] could not have existed except for cross-ownership."[38]

In its 1975 decision, however, the Commission reversed course by adopting regulations prohibiting the joint ownership of a broadcast station and a daily newspaper in the same community.[39] The newspaper/broadcast ban was adopted as part of a series of cross-ownership restrictions that the FCC enacted in the 1960s and 1970s, including the "one-to-a-market" rule (prohibiting common ownership of radio and television stations in the same market) as well as rules prohibiting television stations, television networks, and telephone companies from owning cable systems in their home markets.[40] The general impetus behind these rules was to prevent any one party from owning more than a single local media outlet.

At the time that the Commission adopted these cross-ownership prohibitions, the local marketplace was limited and, apparently, highly saturated. In 1975, the broadcast television industry was dominated by three national television networks, complemented in some of the larger markets by a handful of "independent" stations.[41] The three networks had a viewing share that exceeded 90 percent, while that of the independent stations had yet to reach double

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[38] Id. at 1108 (concurring statement of Commissioner Reid). Similarly, the Commission observed that many such newspaper-owned stations "began operation long before there was hope of profit" and that, without their efforts, "service would have been much delayed in many areas." Id. at 1078.

[39] See 47 C.F.R. § 73.3555(d) (1996) (formerly 47 C.F.R. § § 73.35(a), 73.240(a)(1), and 73.636(a)(1)). The rule also serves to prevent broadcasters from acquiring co-located newspapers.

[40] See generally 1975 Multiple Ownership Report, 50 FCC 2d at 1047-49.

[41] See Network Financial Interest & Syndication Rules, 23 FCC 2d 382 (1970), aff'd sub nom. Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

figures, and the viewing share of cable operators was insignificant.[42] The Commission envisioned little potential for expansion of this highly concentrated market, observing that "the broadcast medium has matured" and that "the channel in question may be the last one or one of the last available for the community."[43]

Further, the cable industry did not make, nor was it viewed as having the potential to make, a significant contribution to diversity. Cable television had its origins in "community antenna" services, or CATV, designed merely to provide better reception of over-the-air television signals. The primary function of these early cable systems was simply to ensure that viewers in small communities received the signals of three network affiliates.[44] In 1975, the cable industry served fewer than 10 million homes, and the prospect of widespread availability of cable service including origination as well as broadcast programming seemed dim.[45] Indeed, the FCC noted that "[m]any cable systems do not originate nor, of course, do they carry signals of [additional] stations dealing with local issues. The signals they import are those of outside stations."[46]

Similarly, the D.C. Circuit observed at the time that in view of the enormous capital outlays necessary, "extension of cable service with cablecasting capability to the country as a

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[42] See F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996, 4000, 4019 (1991) ("OPP Report").

[43] 1975 Multiple Ownership Report, 50 FCC 2d at 1075.

[44] See Cable Television Report and Order, 36 FCC 2d 143, 179 (1972).

[45] See HBO, 567 F.2d at 24.

[46] 1975 Multiple Ownership Report (Reconsideration), 53 FCC 2d at 593.

whole does not seem possible in the immediate future."[47] In this restricted environment, the Commission certainly could not have been expected to foresee the growth of independent stations, the emergence of a fourth, fifth, and sixth national network, or the development of the myriad of other alternatives to the traditional broadcast and print media that have arisen during the two decades that followed.

Ironically, in its 1975 decision, the Commission found that, in general, there was significant diversity or "separate operation" between commonly owned stations and newspapers, acknowledging that such separation was an "important point" in its consideration of the cross-ownership issue (and in particular its determination to grandfather virtually all existing combinations).[48] In addition, the FCC found that newspaper-affiliated stations tended to be superior licensees in terms of locally oriented service.[49] Specifically, based upon an examination of programming reports filed by licensees, the FCC found that, on average, co-located newspaper-owned stations programmed six percent more local news, nine percent more non-entertainment programming, and twelve percent more local programming than other TV stations.[50] The Commission described these findings as "show[ing] an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars."[51] Further, the Commission expressly conceded that "there is

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[47] HBO, 567 F.2d at 24.

[48] 1975 Multiple Ownership Report, 50 FCC 2d at 1089.

[49] Id. at 1078-81.

[50] Id. at 1094-98, app. C.

[51] Id. at 1078.

no basis in law or fact for finding newspaper owners unqualified as a group for future broadcast ownership."[52]

Despite this admission, and the lack of any evidence showing anticompetitive conduct by cross-owners, the Commission proceeded to adopt regulations prohibiting the future grant of an AM, FM or television broadcast station license to any party "who directly or indirectly owns, operates or controls" a daily newspaper in the same community.[53] To justify the new cross-ownership ban, the FCC relied on what the agency itself acknowledged to be a "mere hoped for gain in diversity."[54] Rather than providing any concrete evidence that the rule would in fact enhance diversity in the media marketplace, the Commission offered only its observation that licensing newspaper owners to operate broadcasting stations "is not going to add to already existing choices, is not going to enhance diversity."[55] This reasoning was appropriately labeled as "51 voices are necessarily better than 50,"[56] and plainly reflects the agency's unproven assumption that greater diversity in ownership will translate, automatically, into greater diversity in programming content.

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[52] Id. at 1075.

[53] 47 C.F.R. § 73.3555(d) (1996) (formerly 47 C.F.R. §§ 73.35(a), 73.240(a)(1), and 73.636(a)(i)).

[54] 1975 Multiple Ownership Report, 50 FCC 2d at 1078.

[55] Id. at 1075.

[56] Id. at 1059.

In reviewing the FCC's 1975 order, the D.C. Circuit noted that "[t]he Commission enacted these rules without compiling a substantial record of tangible harm."[57] Similarly, although it ultimately affirmed the prohibition adopted by the Commission, the United States Supreme Court recognized that "the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition."[58] To the contrary, the Court noted that "the Commission has repeatedly renewed [the] licenses [of cross-owned stations] on the findings that continuation of service offered by the common owner would serve the public interest."[59] Thus, "[t]he prospective rules were justified [only] by reference to the Commission's policy of promoting diversification of ownership," which "would possibly result in enhanced diversity of viewpoints."[60]

Simply put, the newspaper/broadcast cross-ownership ban was adopted on a thin evidentiary record and based on speculative "best-guesses" by the Commission in 1975 as to how its regulations would impact viewpoint diversity, and possibly, economic competition. In

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[57] NCCB v. FCC, 555 F.2d at 944. To the contrary, according to the court, the record contained "little reliable 'hard' information." Id. at 956. The Court further expressly noted the absence of evidence in the record of specific anticompetitive acts by cross-owned stations. See id. at 959. In addition, Judge Bazelon observed that technological improvements could eventually eliminate spectrum scarcity, and that "[a]lleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the need for all licensing save that necessary to prevent interference." Id. at 950 n.31. Thus, Judge Bazelon clearly foresaw the time when a diverse and competitive information marketplace would render the newspaper/broadcast cross-ownership restriction obsolete.

[58] FCC v. NCCB, 436 U.S. at 786 (citation omitted).

[59] Id. at 783.

[60] Id. at 786.

his separate statement accompanying the current Notice of Inquiry, Commissioner Powell sounded a call for a more concrete articulation of the government's diversity objective, lamenting that current diversity standards are "bathed in difficult subjective judgments and debated in amorphous terms."[61] NAA submits that the newspaper/broadcast cross-ownership prohibition falls squarely into the category of FCC rules that Commissioner Powell has criticized as being "hinged on considerations . . . loosely call[ed] diversity."[62] Further, because the amorphous diversity standard underlying the newspaper/broadcast cross-ownership restriction has never been supported with concrete evidence or articulated with "adequate rigor and clarity," it cannot serve as a justification for continuation of the proscription.[63]

V. ALTHOUGH IT HAS CONTINUED TO APPLY THE 1975 RULE RIGIDLY, THE COMMISSION -- AS WELL AS CONGRESS AND THE COURTS -- HAVE RECOGNIZED THAT A THOROUGH REEXAMINATION OF THE RESTRICTION IS APPROPRIATE.

Since the adoption of the newspaper/broadcast cross-ownership prohibition in 1975, the Commission has applied the rule mechanically and rigidly, without ever reexamining its factual and legal underpinnings. For the past two decades, the owners of grandfathered combinations have been precluded from acquiring additional stations in the same markets and from selling their combinations intact. Moreover, other daily newspaper publishers have been barred from station ownership in their home markets altogether, and local broadcasters have been prevented from acquiring or establishing daily newspapers in their communities of license. Indeed, the

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[61] See Notice of Inquiry (separate statement of Commissioner Powell).

[62] Id.

[63] Id.

Commission has granted only three permanent waivers of the rule in the more than twenty years since its adoption.[64] In recent years, the Commission has clung to its outdated rule and waiver policies in refusing to grant permanent relief even in the largest and most diverse markets, despite repeated recognition by all of the then-sitting Commissioners of the need for a broad reexamination of the proscription.[65]

For example, in Capital Cities/ABC, Inc.,[66] the Commission denied the request of the Walt Disney Company ("Disney") for permanent waivers for newspaper/radio combinations in Dallas-Fort Worth and Pontiac-Detroit. Notwithstanding the demonstrated level of diversity and competition in these markets and the recognition of the need for a "full review" of the rule, the Commission granted Disney only a temporary waiver, stating its intention to

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[64] See Field Communications Corp., 65 FCC 2d 959 (1977); Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995); Columbia Montour Broad. Co., FCC 98-114 (rel. June 11, 1998).

[65] The Commission originally crafted its rigid waiver standard to apply to waiver requests from the sixteen "egregious" cross-owners targeted for divestiture in 1975. See 1975 Multiple Ownership Report, 50 FCC 2d at 1080, 1085. Thus, the standard was intended to apply only to the few "true monopoly situations" evidencing an "overwhelming" need for divestiture at the time the cross-ownership provision was adopted. Id. at 1081, 1083. This same waiver standard, however, has subsequently been extended to all newspaper/broadcast cross-ownership waiver cases. Newspaper/Radio NOI, 11 FCC Rcd at 13004. As demonstrated by the paucity of permanent waivers granted by the Commission, the standard has served as a nearly insurmountable barrier to meaningful relief in the broader range of cases that do not involve the "monopoly" situations that were the focus of the FCC's concern in 1975.

[66] 11 FCC Rcd 5841, 5895 (1996) ("ABC/Disney").

"commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously." [67]

Then-Chairman Reed Hundt was one of several Commissioners to issue a separate statement in the ABC/Disney case in order to emphasize the need for a broad review of the rule. Indeed, he urged the Commission to conduct an expedited review of all of its cross-ownership rules. In support of this position, Chairman Hundt noted that the "welfare-enhancing" merger that had just been approved in the ABC/Disney case would not have been possible if the Commission had not recently repealed its financial interest and syndication rules.[68] In addition, the former Chairman asserted that a general review of the cross-ownership rules is necessary "especially when . . . there is reason to believe that at least one of those rules, the newspaper-broadcast cross-ownership rule, is right now impairing the future prospects of an important national source of education and information: the newspaper industry."[69]

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[67] Id. at 5888. At the time this decision was issued, both markets met the top 25 markets/30 voices standard applied to waiver requests under the one-to-a-market rule. In the Dallas-Fort Worth market, there were 87 broadcast stations, 69 of which were separately owned, as well as a cable penetration rate of 49.1%. In the Detroit market, there were 71 broadcast stations, of which 46 were separately owned, and a cable penetration rate of 63.5%. Further, both markets offered MDS/MMDS services and were served by other daily newspapers, numerous national magazines, weekly newspapers, and other media. See id. at 5881.

[68] Id. at 5906 (separate statement of Chairman Hundt).

[69] Id.

Chairman Hundt thus applauded the promise that the Commission made in the ABC/Disney decision to review the newspaper/broadcast cross-ownership restriction:

> Our current strict prohibition on newspaper-broadcast cross-ownership, which also may be unnecessarily denying broadcasters revenue they could put to good use, needs review and probably needs significant revision. The Commission today quite rightly commits to conduct, and to complete expeditiously, an open proceeding to modify its newspaper-broadcast cross-ownership rules as necessary.[70]

The agency subsequently reneged on this promise, however, initiating a notice and comment proceeding only with respect to the much narrower issue of whether and how to amend the existing waiver policy for newspaper/radio cross-ownership.[71] It then extended Disney's waiver until six months after completion of the proceeding.[72]

Despite its recognition in the ABC/Disney case of the rule's questionable relevance in today's competitive media marketplace, the FCC subsequently denied a similar waiver request by Tribune Company ("Tribune").[73] Tribune, which publishes the Fort Lauderdale, Florida Sun-Sentinel, sought a permanent waiver to permit the acquisition of WDZL(TV), a UHF television station licensed to Miami. As part of its waiver request, Tribune demonstrated that

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[70] Id. (separate statement of Chairman Hundt); see also id. at 5915 (separate statement of Commissioner Barrett) ("The fact that this rule is over twenty (20) years old provides an even more compelling justification for the Commission's initiation of a rulemaking proceeding to determine the future applicability of this rule."); id. at 5918 (separate statement of Commissioner Ness) ("I believe it is time to initiate a proceeding to reevaluate our newspaper-broadcast cross-ownership rules.").

[71] See Newspaper/Radio NOI, 11 FCC Rcd at 13004.

[72] See Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Joel Rosenbloom and Alan Braverman (Oct. 24, 1996).

[73] See Stockholders of Renaissance Communications, 12 FCC Rcd 11866 (1997).

the South Florida market enjoyed an abundance of media outlets, including 23 separately owned television stations, 69 radio stations (49 of which were separately owned), six separately owned daily newspapers (including the Miami Herald), and at least 15 weekly community newspapers.[74] At the time of Tribune's waiver request, the cable penetration rates in the affected counties were 60%, 79%, and 78%. In addition, Tribune's analysis of the South Florida advertising market showed that over $2 billion was spent on advertising in that market, but that only 1.642% of that amount was spent on WDZL(TV) and 12.336% on Sun-Sentinel publications.[75]

The agency, however, rejected Tribune's detailed showing of the level of media diversity and competition in the Miami/Fort Lauderdale market as well as its specific proposals to augment the news and information programming of the television station involved.[76] The Commission concluded that Tribune's showing as to the wealth of media outlets "does not appear to present exceptional circumstances.[77] (NAA agrees with the Commission's observation that the high level of diversity and competition in the South Florida information marketplace is representative of that in other markets nationwide; that very fact, however, provides a compelling basis for elimination of the cross-ownership ban altogether, not for rigid application of an outdated waiver standard.)

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[74] Id. at 11880-81.

[75] Id.

[76] See id. at 11880-82.

[77] Id. at 11886.

The FCC also observed that "certain of the benefits identified by Tribune, such as enhanced news gathering and public service campaigns, appear to be of the type that would exist in virtually all newspaper/broadcast combinations."[78] Citing ABC/Disney, the agency once again stated that "an open proceeding, rather than a restricted adjudication is the better forum to address [the] issues [raised in support of the waiver]."[79] The Commission granted Tribune a 12-month temporary waiver to permit the orderly divestiture of one of the properties.[80] Commissioners Chong and Quello both made clear, however, that they "would have preferred to initiate a rulemaking and grant a temporary waiver pending the outcome of that rulemaking" and strongly questioned the validity of the cross-ownership ban in the current competitive media environment.[81]

Similarly, in ruling on the appeal in the Tribune case, the D.C. Circuit expressed considerable reservations about the continued application of the cross-ownership proscription. Tribune Co. v. FCC.[82] Although the court ultimately upheld the Commission's decision to deny the Tribune waiver, it did so primarily based on its determination that granting the waiver

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[78] Id. at 11887.

[79] Id. at 11888 (citing ABC/Disney, 11 FCC Rcd at 5891).

[80] Id. at 11891.

[81] Id. at 11896 (concurring statement of Commissioner Chong). Commissioner Chong further stated that "[t]he Commission should be reexamining this rule to determine whether it makes sense in our current competitive media environment." Id. Similarly, Commissioner Quello noted that "[t]he majority's decision today relies on a newspaper-television ownership rule which, in my opinion, is out-dated, over-regulatory, and all too often flies in the face of common sense." Id. (dissenting statement of Commissioner Quello).

[82] 133 F.3d 61 (D.C. Cir. 1998).

request would call into question the validity of the rule itself and that such a broad inquiry would be appropriate undertaken in a general rulemaking proceeding.[83] The court, however, openly criticized the maintenance of the cross-ownership ban, observing that the Commission "apparently [was] still wedded to [the] judgment" that it was unrealistic to expect diversity from commonly owned broadcast stations and newspapers.[84] The court also questioned the continuing viability of the scarcity rationale underlying the rule, noting that "[i]t may well be that faced with a rulemaking petition the FCC would be thought arbitrary and capricious if it refused to reconsider its rule in light of persuasive evidence that the scarcity rationale is no longer tenable."[85]

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[83] See id. at 68.

[84] Id. at 69.

[85] Id. at 68. The court also noted that "[i]t seem[ed] a shame for Tribune not be given the same relief as Disney" and that "[t]he Commission's answer as to why it granted a temporary waiver pending the completion of a rulemaking [to Disney], but did not in Tribune's case seems inexplicable." Id. at 70. Prompted by the Court's criticism, the FCC subsequently extended Tribune's waiver until six months after the conclusion of its reexamination of the newspaper/television cross-ownership restriction. Stockholders of Renaissance Communications, DA 98-456 (rel. Mar. 6, 1998).

In WSB, Inc. v. FCC, 85 F.3d 695 (D.C. Cir. 1996), the D.C. Circuit expressed similar skepticism regarding the utility of the Commission's cross-ownership rules in today's competitive media marketplace. The case involved the efforts of Cox Enterprises ("Cox") to acquire an FM radio station in the Atlanta market, in which it already owned two daily newspapers (The Atlanta Constitution and The Atlanta Journal), a VHF television station, and two radio stations. The Court did not reach the newspaper/broadcast cross-ownership issue directly, but its comments on Cox's one-to-a-market waiver request are telling. Thus, although the Court ultimately determined that the Commission's refusal to grant Cox a waiver based on the top 25 markets/30 voices standard was consistent with FCC precedent, the Court expressly questioned the Commission's rigid waiver policy: "It escapes us why Cox's ownership of WJZF radio is more threatening to the public interest because of its ownership of other radio stations or, more generally, why the proposed assignment is inimical to the public interest notwithstanding Cox's other media holdings." Id. at 701.

In the past, the Commission's ability to reexamine the newspaper/broadcast rule has been circumscribed by riders attached by Congress to the annual FCC appropriations legislation.[86] As the agency is well aware, however, the congressional ban on using authorized funds to reexamine the rule is no longer included in appropriations legislation.[87] To the contrary, as discussed above, Congress directed the Commission to review all of its cross-ownership rules biennially, and to "repeal or modify any regulation it determines to be no longer in the public interest."[88] Thus, in addition to the judicial as well as the Commission's own recognition of the need to reevaluate the relevance of the cross-ownership ban, Congress now has given the FCC a "green light" to abolish this anachronistic restriction on media ownership.[89]

NAA submits that maintenance of this selective cross-ownership restriction in the abundantly diverse and highly competitive mass media marketplace of the late 1990s is not only unnecessary, but also is discriminatory and therefore unjustifiable. As shown in NAA's Petition for Rulemaking and in the following sections, the "hoped for gain in diversity" that

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[86] See, e.g., Department of Justice and Related Agencies, Appropriations Act, 1992, Pub. L. No. 102-395, 106 Stat. 1828 (1992).

[87] See Newspaper/Radio NOI, 11 FCC Rcd at 13006-07 n.20.

[88] 1996 Telecom Act § 202(h).

[89] In fact, two bills are presently pending that, if enacted into law, would require the FCC to eliminate the newspaper/broadcast cross-ownership ban. See S. 641, 105th Cong. 1st Sess. (1997)(sponsored by McCain (R-AZ)); H.R. 2171, 105th Cong. 2d Sess. (1998)(sponsored by Klug (R-WI), Oxley (R-OH), Hall (D-TX), Stearns (R-FL), and Paxson (R-NY)); see also 143 Cong. Rec. S3662-63 (Apr. 24, 1997) (statement of Senator McCain)("[T]his legislation would eliminate one of the most archaic provisions remaining . . . . the law that keeps one entity from owning both a newspaper and a radio or TV station in the same market. It's time to finally get rid of this relic.")

was the premise for the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 has been achieved, not through governmental regulation, but through the technological revolution of the past two decades and the explosive growth in competition in mass media. Accordingly, the Commission should promptly move beyond this "inquiry" and initiate a rulemaking proceeding to eliminate the newspaper/broadcast cross-ownership rule. It is time for the agency to remove itself from its unnecessary and counterproductive involvement in this area.

VI. THE MARKETPLACE FOR NEWS, INFORMATION, AND ENTERTAINMENT IS VASTLY MORE DIVERSE AND DRAMATICALLY MORE COMPETITIVE THAN IN 1975, WHEN THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE WAS ADOPTED.

In the Petition for Rulemaking, the NAA documented the transformation the mass media marketplace has undergone in the years since the newspaper/broadcast cross-ownership rule was first implemented in 1975.[90] NAA showed that over the past two decades, the traditional forms of mass media outlets -- newspaper publishing and radio and television broadcasting -- have grown at a phenomenal rate, both in terms of the sheer number of voices available and in the accessibility of a rich variety of programming formats. NAA also described the extraordinary number of new media entrants that have emerged in recent years, including videocassettes, direct broadcast satellite service, wireless cable, SMATV, DARS, and the Internet.

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[90] See NAA Petition at Sec. V, 17-18.

Not only are these new media significant alternative outlets for the dissemination of information, but they also have evolved as legitimate competitive threats to existing media -- erasing any realistic prospect that a newspaper/broadcast combination could adversely impact diversity or competition in the local marketplace. Despite the showing already on the record, however, the Commission in its Notice of Inquiry again asks whether media markets are sufficiently diverse, and seeks comment on the impact the newspaper/broadcast cross-ownership rule has on competition.[91]

A. Growth in the Variety of Existing Print, Audio, and Video Programming Sources, Along With the Emergence of New Technologies, Eliminate Any Practical Barriers to Mass Communication and Assure That a Countless Number of Diverse Information Sources Will Continue To Be Available in Every Community.

The Commission's concern that the combination of a daily newspaper with a broadcast outlet in a local market could somehow limit media diversity and place a stranglehold over local news and information is based on a single snapshot of the world taken more than two decades ago -- an outdated image of a media marketplace that has long since been transformed. Today, there is a phenomenal range of information outlets available to consumers. Indeed, it is hard to imagine a place in the United States where citizens do not have easy access to any of number of locally published newspapers (daily, weekly, ethnic, religious, or other specialty newspapers), thousands of magazines, a wide selection of free, over-the-air radio and television stations, the option to subscribe to cable television and direct broadcast satellite video programming, and easy access to the limitless resources available on the Internet.

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[91] See Notice of Inquiry at 13-14.

1. In Addition to the Traditional Print Media, Weekly, Alternative Newsweekly, and Specialty Newspapers Contribute Significantly to the Availability of Diverse Sources of Local News and Information.

As NAA demonstrated in the Petition for Rulemaking, the number and variety of newspapers available to readers have increased greatly since the newspaper/broadcast cross-ownership rule was adopted.[92] Although the number of daily newspapers published in the United States has declined in the past twenty years, overall circulation has remained steady.[93] It is the explosive growth in circulation of weekly and "alternative newsweekly" newspapers, however, that has vastly increased the number of local news and information outlets available to readers. When the Commission examined outlet diversity in the newspaper industry in its 1975 rulemaking, it barely acknowledged the role weekly newspapers play in providing communities with news and information about local issues.[94]

Because weekly newspapers are "principally community papers that provide in-depth local/neighborhood news and suburban and rural coverage,"[95] they are extremely valuable independent sources of highly localized news and information. It is this steady focus on local issues by weekly newspapers that has contributed to their remarkable success in recent years. Indeed, readership of weekly newspapers now substantially exceeds that of daily newspapers.

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[92] See NAA Petition at 24.

[93] See id.

[94] If anything, the Commission apparently found that weekly and other specialized newspapers were insignificant, stating that "[n]ot all print media are equal or generally circulated." See 1975 Multiple Ownership Report, 50 FCC 2d at 1075.

[95] Veronis, Suhler & Associates, Communications Industry Forecast, at 256 (July, 1997) ("Communications Industry Forecast").

In 1996, the 7,915 U.S. weekly newspapers enjoyed a combined circulation of 81.6 million, while the 1,520 U.S. daily newspapers had a circulation of 57 million every day and a Sunday circulation of 60.8 million.[96]

Perhaps more important than raw circulation figures, however, is the fact that weekly newspapers typically are distributed to readers free of charge. In 1996, 75.5 percent of weekly newspaper circulation was distributed free, and industry analysts predict that by the year 2001 nearly 80 percent of weekly newspaper circulation will be distributed at no charge to readers.[97] Thus, anyone, regardless of income, can obtain local news and information from a weekly newspaper.

In addition to examining the contributions traditional weekly newspapers make to assuring a diverse market for local news and information, it is critical that the Commission consider the impact of "alternative newsweekly" newspapers on diversity. Alternative newsweeklies such as the City Paper in Washington, D.C. or the Village Voice in New York (also typically distributed free of charge) "offer an editorial mix of political, investigative reporting, and entertainment, often with an opinionated, subjective, and controversial tone," and play a central role in providing a local outlet for speakers who may not be heard in the

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[96] See Newspaper Association of America, Facts About Newspapers 1997, at 13, 23, 25 ("NAA Facts About Newspapers").

[97] See Communications Industry Forecast at 259. This has not always been the case. As recently as 1984, only 55 percent of weekly circulation was distributed for free. See id.

mainstream press.[98] Circulation of alternative newsweeklies is on the rise, up from 4.35 million in 1992 to 6.39 million in 1996, a 50 percent increase in just five years.[99]

Beyond growth in local newspaper markets, newspapers such as USA Today and The Wall Street Journal have been successful in building a national following in recent years.[100] And, just last week, the Los Angeles Times announced that it will launch a national edition aimed at giving readers "a more timely and complete version of the newspaper."[101] There is also a remarkable wealth of special interest newspapers available to readers, catering to every subject imaginable. The most recent edition of Editor & Publisher Yearbook lists 185 African American newspapers published in 35 states and the District of Columbia, 107 Hispanic newspapers published in 19 states and the District of Columbia, 98 Jewish newspapers published in 31 states, 159 other "ethnic" newspapers published in the United States, 43 gay and lesbian newspapers published in 24 states and the District of Columbia, 134 military newspapers published in 38 states, 132 religious newspapers published in 40 states and the District of Columbia, and 1,326 college newspapers (many of which are published daily) in all 50 states plus the District of Columbia.[102]

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[98] Id. at 257.

[99] See id. at 258.

[100] National newspapers are not subject to the newspaper/broadcast cross-ownership restrictions. See Stockholders of CBS Inc., 11 FCC Rcd 3733, 3779 (1995); Gannett Co., Inc., 102 FCC 2d 1263, 1266 (1986).

[101] California and the West The Times to Launch National Edition This Fall, L.A. Times, July 15, 1998, at A3.

[102] See Editor and Publisher Yearbook 1998 at II-1 to II-124.

2. Through the Internet, Citizens Can Communicate Easily with a Mass Audience or Obtain Information On Any Subject Imaginable.

Within the past five years, the Internet has transformed the information marketplace in a way unimaginable when the newspaper/broadcast cross-ownership rule was adopted over twenty years ago. It is estimated that about 62 million Americans now use the Internet[103] -- slightly more than the number that subscribe to daily newspapers.[104] Moreover, as the price of personal computers continues to drop (PC's already can be purchased for less than $1000 dollars),[105] millions more will sign onto the Net. In fact, new technology already has emerged that allows consumers to gain access to the Internet without buying a personal computer. Using WebTV, consumers can purchase a set-top device for as little as $99 that allows them to use their television set as a monitor and connect to the Internet over their existing local telephone line.[106] Indeed, 72 percent of WebTV's 300,000 subscribers (up from 56,000 last year) do not own a personal computer.[107] Those without access at home can get online at

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[103] See Thomas E. Weber, The Big Question: Who Is On The Net?, The San Diego Union-Tribune, May 5, 1998 at 6 ("Who Is On The Net?").

[104] In 1996, U.S. Daily newspaper circulation was 57 million, and Sunday circulation was 60.8 million. NAA Facts About Newspapers at 13.

[105] See Robert D. Hof, How The 'PC Killer' Was Humbled -- Slow Machines and Cheap Rivals Undercut Network Computers, Business Week, Apr. 13, 1998 at 61. The average PC price is just $1,169, 40 percent lower than last year's cost. Id.

[106] See Peter Lewis, Tech Reviews -- Fast Forward on WebTV Brings Needed Advances, The Seattle Times, Apr. 12, 1998 at C4.

[107] See Various Forms of Webcasting Are Advancing, Proponents Say at NAB, Communications Daily, Apr. 10, 1998 at 3.

work, through any of the many public libraries that provide free Internet terminals,[108] or at one of the numerous "cyber-cafes" that provide free Internet access for the price of a cup of coffee.[109] Once on the Internet, the user finds that the amount of information available is almost beyond comprehension. There are roughly 320 million individual web pages on the Internet (most web sites have multiple pages.)[110] By comparison, the New York Public Library has 13 million books in its main collection and 5 million in its branches.[111]

While the Internet is often hyped as the ultimate "global" computer network, it has become a rich resource for local information as well. Detailed information can be found on thousands of U.S. cities. One search engine, Yahoo!, which can organize Internet sites by city, lists over 1,100 Internet sites for 77 cities in Alaska alone.[112] Yahoo! also lists over 900 Internet sites for 106 cities in Rhode Island (the smallest state, geographically),[113] and about

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[108] For example, in Charlotte, N.C., an electronic access network called Charlotte's Web provides local citizens with public-access terminals throughout the city, and free e-mail. See Laura A. Siegel, Libraries Shelve Their Stuffy Image, Christian Science Monitor, Aug. 7, 1997 at 12; <http://www.charweb.org/> (visited July 10, 1998). In New York City, the public library system has over 500 computers with Internet access. See Andy Pollack, Information Technology and Socialist Self-Management, Monthly Review, sec. 4, vol. 49, Sept. 1997 at 32.

[109] See e.g., Mark Larson, When Trends Collide: Gourmet Coffee Meets The Internet, The Business Journal-Sacramento, Jan. 16, 1998 at 15.

[110] See Who Is On The Net? at 6.

[111] See id.

[112] See <http://www.yahoo.com/Regional/U_S__States/ Alaska/Cities/> (visited July 10, 1998).

[113] See <http://www.yahoo.com/Regional/U_S__States/ Rhode_Island/Cities/> (visited July 10, 1998).

54,000 sites for 887 communities in California.[114] Of course, Yahoo! users can search for Internet sites by county, state, country, or virtually any other descriptive category.

Moreover, the Internet is enhancing the reach of local newspapers. Today, using the NAA's NewspaperLinks.com site,[115] readers anywhere have a direct link any one of the 750 newspapers now offering information online.[116] For example, NewspaperLinks.com offers direct connections to 36 local newspapers in Minnesota, 17 newspapers in Tennessee, and 7 newspapers in New Mexico. As a result of sites like this, news, public affairs, and commentary from local newspapers are available to anyone, regardless of how far away they are from home. More importantly, sites like NewspaperLinks.com empower readers to sample multiple information outlets at practically no cost, thus providing a rich resource of divergent viewpoints.

The Internet also has emerged almost overnight as a powerful force in shaping political debate. As noted in NAA's Petition, following the 1996 election, approximately 8.5 million voters said that information they obtained on the Internet influenced their vote.[117] In October, 1994, 1,000 Internet users "listened" to a debate between two Minnesota candidates for U.S. Senate -- as the candidates argued, nearly 600 members of the audience participated in an

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[114] See <http://www.yahoo.com/Regional/U_S__States/ California/Cities/> (visited July 10, 1998).

[115] <http://www.NewspaperLinks.com> (visited July 18, 1998).

[116] See New NAA Web Site Links Consumers Newspapers Online, available at <http://www.naa.org/about/news/newslinks.html> (visited July 18, 1998).

[117] See Rajiv Chandrasekaran, Politics Finding a Home on the Net; Post-Election Surveys Show the Web Gains Influence Among Voters, Wash. Post, Nov. 22, 1996, at A4.

unmoderated discussion on the candidates' positions.[118] On election night in California in 1994, almost 50,000 users logged on to a minute-by-minute tally of state election results as part of the California Online Voter Guide.[119] More recently, Democrats have unveiled an Internet page to publicize problems with managed care in hopes of increasing pressure on GOP leaders to act on the issue.[120]

With the Internet, anyone with an opinion can be a publisher and can easily afford to communicate with a mass audience. Jonathan Wallace, publisher of the Ethical Spectacle, an on-line magazine that examines the intersection of ethics, law, and politics, "had daydreamed about publishing . . . a print newsletter" for years, but found that it was too costly to reach a large audience. But, Wallace says, "in the new and affordable medium of the World Wide Web," he can afford to publish a new issue of the Ethical Spectacle each month.[121] Clearly then, the emergence of the Internet virtually guarantees that a healthy, diverse media

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[118] Graeme Browning, Electronic Democracy: Using the Internet to Influence American Politics, at 2 (Pemberton Press 1996); see also <http://www.onlineinc.com/pempress/democracy/chl.html> (visited July 10, 1998).

[119] Id. at 3.

[120] See Alice Ann Love, Vote on Managed Care Bill Urged, AP Online, May 6, 1998. Indeed, using the Internet, citizens have the ability to participate in public debate to a greater extent than ever before. Richard Hartman of Spokane, Washington, organized a political action committee via the Internet to help bring about the defeat of then-Speaker of the House of Representatives Thomas Foley (D-Wa.). Hartman, who had no prior political experience, raised $30,000 from his on-line efforts which he used to print anti-Foley bumper stickers, T-shirts, pins and leaflets. Foley was defeated in the November 1994 election by a margin of less than 4,000 votes. See Charles Bowen, Rocking the Vote -- As Political Info on the Web Grows, The Balance of Power in Elections May Swing Back to the People, Home PC, Nov. 1, 1996 at 140.

[121] Jonathan Wallace, The Ethical Spectacle <http://www.spectacle.org/> (visited July 10, 1998).